

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

RAE DAVIS,	)	
	)	No. 08-676-HU
Plaintiff,	)	
	)	
v.	)	
	)	FINDINGS AND
	)	RECOMMENDATION
PACIFIC SAW AND KNIFE CO.,	)	
dba PACIFIC HOE/SAW AND	)	
KNIFE CO., an Oregon	)	
corporation,	)	
	)	
Defendant.	)	
	)	

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Attorney for defendant

HUBEL, Magistrate Judge:

Plaintiff Rae Davis brings this action against Pacific Saw and Knife Company (Pacific Saw), her employer, asserting claims for violation of the Family Medical Leave Act, 29 U.S.C. § 2601 *et seq.*

1 (FMLA), the Oregon Family Leave Act, Or. Rev. Stat. § 659A.150 et  
2 seq. (OFLA), breach of the implied covenant of good faith and fair  
3 dealing, intentional infliction of emotional distress, and reckless  
4 infliction of emotional distress.

5 Pacific Saw moves under Rule 12(b)(6) of the Federal Rules of  
6 Civil to dismiss Davis's claims for breach of the implied covenant  
7 of good faith and fair dealing; intentional infliction of emotional  
8 distress; and reckless infliction of emotional distress, the third,  
9 fourth and fifth claims for relief.

#### 10 **Factual Background**

11 Ms. Davis began working for Pacific Saw in February 1981. She  
12 left in May 1990 and returned in April 1991. She has been employed  
13 by Pacific Saw since April 1991.

14 Ms. Davis alleges that during 2007-2008 she had three  
15 surgeries for three health conditions: a colonoscopy to remove pre-  
16 cancerous polyps in October 2007; a hysterectomy in January 2008  
17 after internal bleeding; and a diagnosis of skin cancer in August  
18 2008, with surgery to remove the cancer. Complaint ¶ 6.

19 Ms. Davis alleges that although her doctors gave her  
20 significant medical leaves, she did not take off all the time  
21 recommended, and used vacation days, instead of sick days or family  
22 leave days, in order attend pre- and post-operative medical  
23 appointments. Id. at ¶ 7. She alleges that over the year she took  
24 only 15 sick days and an additional 11 days after the hysterectomy,  
25 which Pacific Saw counted as "leave." Id.

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1 Ms. Davis alleges that despite receiving good performance  
2 reviews, she was demoted on April 8, 2008 from her salaried  
3 position with benefits that included unlimited paid sick days, to  
4 an hourly position with only six sick days which did not accrue  
5 until April 29, 2008. Id. at ¶ 10, 11. She asserts that the cut in  
6 paid sick leave have forced her to cancel necessary medical  
7 procedures, and that loss of paid sick leave has caused her to  
8 suffer severe emotional distress.

### 9 **Standard**

10 While a complaint attacked by a Rule 12(b)(6) motion to  
11 dismiss does not need detailed factual allegations, a plaintiff's  
12 obligation to provide the grounds of his entitlement to relief  
13 requires more than labels and conclusions, and a formulaic  
14 recitation of the elements of a cause of action will not do.  
15 Factual allegations must be enough to raise a right to relief above  
16 the speculative level, on the assumption that all of the  
17 allegations in the complaint are true, even if doubtful in fact.  
18 Bell Atlantic Corp. v. Twombly, \_\_ U.S. \_\_, 127 S.Ct. 1955, 1964-65  
19 (2007).

### 20 **Discussion**

#### 21 **A. Claim for breach of the covenant of good faith and fair** 22 **dealing**

23 So long as it is not inconsistent with the express terms of a  
24 contract, see, e.g., Eggiman v. Mid-Century Ins. Co., 134 Or. App.  
25 381, 386 (1995), the duty of good faith and fair dealing is a  
26 contractual term that is implied by law into every contract. Best  
27 v. United States Nat'l Bank of Oregon, 303 Or. 557, 561 (1987);

1 Esso Petroleum Canada v. Security Pacific Bank, 710 F. Supp. 275,  
2 282 (D. Or. 1989). The contractual good faith doctrine is designed  
3 to "effectuate the reasonable contractual expectations of the  
4 parties." Best at 561.

5 Ms. Davis alleges that the duties and obligations between  
6 herself and Pacific Saw were "at all times governed by the terms  
7 and conditions set forth in the Pacific Employee Manual," and that  
8 the terms and conditions in the employee manual "represent a  
9 unilateral contract ... the provisions of which were accepted by  
10 Davis as the terms and conditions of employment with Pacific."  
11 Complaint ¶¶ 35, 36. Ms. Davis has not attached a copy of the  
12 employee manual to the complaint. Nor has she alleged the  
13 contractual terms she relies on in the complaint.

14 A contract of employment requires the existence of a mutual  
15 intent on the part of the parties to be bound by its terms. Burnett  
16 v. Ross Stores, 857 F. Supp. 1434, 1440 (D. Or. 1994). The  
17 "introduction" to the manual is attached to the Declaration of Mona  
18 Becker, Pacific Saw's Human Resources Manager.<sup>1</sup> Becker Declaration,  
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20 <sup>1</sup> Ms. Davis objects to Pacific Saw's proffer of the  
21 Declaration of Mona Becker without notice to her of its intent to  
22 file a motion for summary judgment. In general, material outside  
23 the pleadings cannot be considered in ruling on a motion to  
24 dismiss under Rule 12(b)(6), unless the motion is treated as one  
25 for summary judgment and the parties are "given reasonable  
26 opportunity to present all materials made pertinent to such a  
27 motion by Rule 56" Jacobson v. AEG Capital Corp., 50 F.3d 1493,  
1496 (9<sup>th</sup> Cir. 1995). A document is not "outside" the complaint,  
and may be considered on a motion to dismiss, if the complaint  
specifically refers to the document, its authenticity is not  
questioned, and the plaintiff's complaint necessarily relies on  
the document. Lee v. County of Los Angeles, 240 F.3d 754, 774  
(9<sup>th</sup> Cir. 2001). When the plaintiff fails to introduce a

1 Exhibit A. The introduction states:

2 This handbook is not intended as a formal or exhaustive  
3 statement of employee rights and responsibilities; nor is  
4 it a contract of employment. It is a summary of the  
5 company's current policies, rules, procedures and  
benefits. ... [T]he company reserves the right to amend,  
modify and/or eliminate any of these policies, rules  
procedures and benefits at any time.

6 This language in the employee handbook is an express disclaimer by  
7 Pacific Saw to be bound by its terms, Burnett at 440, and defeats  
8 Ms. Davis's claim that the employment manual created enforceable  
9 contract rights. See also Curtis v. City of Redmond, 2006 WL  
10 3469574 (D. Or. 2006), citing Lawson v. Umatilla County, 139 F.3d  
11 690, 693 (9<sup>th</sup> Cir. 1998) and Mobley v. Manheim Services Corp., 123  
12 Or. App. 89, 94-95 (1995).

13 In the absence of a contract between herself and Pacific Saw,  
14 Ms. Davis cannot assert a claim for breach of the covenant of good  
15 faith and fair dealing. Further, even if there were a contract, Ms.  
16 Davis has not alleged the terms allegedly breached. Without any  
17 allegation of the terms of the contract, Ms. Davis cannot state a  
18 claim for breach of the covenant of good faith and fair dealing,  
19 because such a claim cannot contradict the express terms of the  
20 contract. Eggiman, 134 Or. App. at 386. I recommend that the claim

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22 pertinent document as part of her pleading, the defendant may  
23 introduce the exhibit as part of its motion attacking the  
24 pleading. See, e.g., Cooper v. Pickett, 137 F.3d 616 (9<sup>th</sup> Cir.  
25 1998) (documents whose contents are alleged in a complaint and  
whose authenticity no party questions, but which are not  
physically attached to the pleading, may be considered in ruling  
on a motion to dismiss). I have therefore considered the  
26 introductory page of the employee manual attached to the Becker  
Declaration, but have considered the Becker Declaration itself  
27 only insofar as it authenticates the page of the employee manual.

1 for breach of the covenant of good faith and fair dealing be  
2 dismissed.

3 **B. Claim for intentional infliction of emotional distress**

4 The elements of intentional infliction of emotional distress  
5 are 1) that the defendant intended to inflict severe emotional  
6 distress on the plaintiff; 2) that the defendant's acts caused the  
7 plaintiff severe emotional distress; and 3) that the defendant's  
8 acts constituted an extraordinary transgression of the bounds of  
9 socially tolerable conduct or exceeded any reasonable limit of  
10 social toleration. McGanty v. Staudenraus, 321 Or. 532, 543 (1995);  
11 Sheets v. Knight, 308 Or. 220, 236 (1989). Oregon cases which have  
12 allowed claims for intentional infliction of emotional distress to  
13 proceed typically involve acts of psychological and physical  
14 intimidation, racism, or sexual harassment. Robinson v. U.S.  
15 Bancorp, 2000 WL 435468 (D. Or. April 20, 2000), quoting Garrison  
16 v. Alaska Airlines, Inc., Civil No. 98-433-KI, Opinion by Judge  
17 King dated June 17, 1999, p. 8.

18 Whether a complaint sufficiently alleges conduct that  
19 constitutes an extraordinary transgression of the bounds of  
20 socially tolerable conduct is a question of law for the court.  
21 Babick v. Oregon Arena Corp., 160 Or. App. 140, 150 (1999).

22 Oregon appellate courts have been "very hesitant to impose  
23 liability for IIED claims in employment settings, even in the face  
24 of serious employer misconduct." Robinson at \*8. In this case, Ms.  
25 Davis has alleged only that she was "demoted" from a salaried  
26 position with unlimited sick leave to an hourly position with  
27

1 limited sick days. Based on the existing case law, this allegation  
2 does not describe conduct by Pacific that is outrageous or beyond  
3 the bounds of socially tolerable conduct. I recommend that the  
4 motion to dismiss the intentional infliction of emotional distress  
5 claim be granted.

6 **C. Claim for reckless infliction of emotional distress**

7 There is no cognizable claim under Oregon law for reckless  
8 infliction of emotional distress. Snead v. Metropolitan Property  
9 and Cas. Co., 909 F. Supp. 775, 779 (D. Or. 1996). In addition, Ms.  
10 Davis has not pleaded facts sufficient to constitute an  
11 extraordinary transgression of the bounds of socially tolerable  
12 conduct.

13 I recommend that the motion to dismiss the reckless infliction  
14 of emotional distress claim be granted.

15 **Conclusion**

16 I recommend that defendant's motion to dismiss the third,  
17 fourth and fifth claims for relief (doc. # 5) be GRANTED.

18 **Scheduling Order**

19 The above Findings and Recommendation will be referred to a  
20 United States District Judge for review. Objections, if any, are  
21 due September 11, 2008. If no objections are filed, review of the  
22 Findings and Recommendation will go under advisement on that date.  
23 If objections are filed, a response to the objections is due

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28 FINDINGS AND RECOMMENDATION Page 7

1 September 25, 2008, and the review of the Findings and  
2 Recommendation will go under advisement on that date.

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4 Dated this 27<sup>th</sup> day of August, 2008.

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6 /s/ Dennis James Hubel

7 Dennis James Hubel  
8 United States Magistrate Judge  
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